United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

~~F-6442~~

76-1279

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To be Argued by
NANCY ROSNER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -

UNITED STATES OF AMERICA

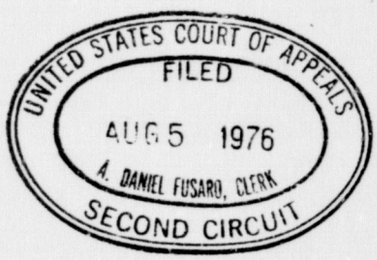
-v-

FRANK MOTEN,

Appellant

- -

BRIEF AND APPENDIX FOR APPELLANT



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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

Frank Moten appeals from the order of the United States District Court for the Southern District of New York, the Honorable Richard Owen presiding entered on May 25, 1976, denying his application to reduce his bail previously set by the magistrate in the amount of $600,000.00 cash or surety bond. The appellant is incarcerated at the Metropolitan Correctional Center because of his inability to post the bond.

The appellant is one of thirty-three individuals charged in indictment 76 Cr.324, with conspiracy and substantive violations of the narcotics laws. One of the counts charges

Mr. Moten with violation of 21 U.S.C. §848. The indictment was returned on April 5, 1976. On Wednesday, April 21, 1976, law enforcement officers went to his home in Englewood, New Jersey. There they spoke with Mrs. Moten who informed them that Mr. Moten was not at home and asked the reason for their inquiry about his whereabouts, specifically inquiring whether they wanted to arrest him. (a 5/25 p.4-5)* She was told they were not there to arrest him and was given a name and telephone number to contact.

While they were conversing Mr. Moten called his home and spoke with the officers. He was not informed that their purpose was to arrest him. The net effect of Mr. Moten's conversation with the officers was that he should contact them upon his return from his business trip.

The following morning, Thursday, Mr. Moten's then attorney, Mr. Arnold Brown, contacted Assistant United States Attorney Daniel J. Beller. During that conversation, Mr. Brown stated that Mr. Moten would surrender and attempted to discuss bail (a 5/25 p.6-7). Mr. Beller would not discuss the subject. Mr. Moten returned to the city and surrendered the following day, Friday, April 23, 1976 at approximately noon. He was arraigned before the magistrate who fixed bail at $600,000.00.

Subsequently, counsel moved to reduce his bail in the district court before the Hon. Lloyd F. McMahon, sitting in the all purpose part of the district court, on April 26, 1976 (a 4/26).

*Numbers in parentheses refer to pages in the transcript located in the appellant's appendix.

That application was denied and subsequent applications to reargue before Judge McMahon were likewise denied on April 27, 1976 (a 4/27).

The case was then assigned to Judge Owen who heard an application to reduce Mr. Moten's bail and denied it on April 29, 1976 (a 4/29 p.17-end). Present counsel moved in writing to reargue that application. The application was heard and denied on May 25, 1976 (a 5/25). This appeal followed.

Because of Mr. Moten's remanded status, trial was originally scheduled to commence on July 19, 1976 pursuant to the district court's ninety-day rule. On July 1, 1976 new rules were adopted in compliance with the Speedy Trial Act of 1974 (18 U.S.C. §3165) which provided for enlargement of the ninety-day rule under certain circumstances. On its own motion, the district court rescheduled the trial to commence August 10, 1976. At present approximately twenty-five individuals are proceeding to trial and by the government's estimate the trial will last approximately ten weeks.

NATURE AND CIRCUMSTANCES OF THE OFFENSE

The defendant is charged with conspiracy, four substantive violations and violation of §848 of the Controlled Substances Act. The essence of the charges is that the defendant bought and sold cocaine, the largest amount being one kilogram, during 1972 and 1973. Nothing in the indictment suggests that the defendant is charged with dealing in heroin.

Certainly these charges do not warrant the setting of bail in the amount of $600,000.00. Indeed, at the time he surrendered on this indictment the defendant was at liberty on $50,000.00 bail which had been fixed on an indictment in the District of New Jersey charging the same conspiracy as that charged here and similar substantive offenses.* Both indictments are predicated substantially on the testimony of Marian Ladd, a conclusion which emerges from the faces of the pleadings and her testimony in United States v. Tutino, Southern District of New York, 75 Cr. 1038 (IBC).

The two indictments diverge, in form and content, because of the inclusion in this district of the testimony of Jack Brown, a fact discernible from his status as an unindicted

*That indictment was dismissed on motion of the government on May 14, 1976.

co-conspirator in this case. It is upon Brown's testimony that the defendant was charged with a §848 violation. Clearly the government's weightiest argument in support of its extraordinary request for bail was the possible life penalty imposable under §848. Thus the viability of that count is a matter of crucial importance to this appeal.

It is respectfully submitted that, based upon the form of the indictment and the particularization of Brown as one of the persons supervised in connection with that charge, it is the government's theory that Jack Brown not Frank Moten, actually supervised five or more persons in the course of Brown's own narcotics activities. Frank Moten's only relationship to Brown and his five underlings is from his alleged distribution to and from Brown. Thus the government's theory appears to be that Brown violated §848 and Frank Moten is vicariously liable for Brown's acts either on a theory of aiding and abetting or on a Pinkerton type theory because of Moten's alleged participation in the conspiracy. See United States v. Pinkerton, 328 U.S. 640, 90 L.Ed. 1489 (1946). Based upon my own experience and knowledge and inquiries I have made of other defense counsel, I know of no case in the district, or elsewhere in the nation, where a §848 count has been predicated on such a theory, nor would reason support such a theory of liability.

THE WEIGHT OF THE EVIDENCE AGAINST THE ACCUSED

Based upon the pleadings and proceedings in the District of New Jersey, the indictment in this district and the investigation I have thus far been able to conduct, the evidence against Mr. Moten seems to derive almost exclusively from two witnesses, Marian Ladd and Jack Brown. Certainly no narcotics have ever been seized from Mr. Moten or from any premises* under his custody and control.

While this Court need not and indeed cannot be involved in a credibility determination at this juncture, nevertheless the quality of the evidence against the accused is certainly relevant to the setting of bail.

Fortunately this Court has available for its inspection Mrs. Ladd's testimony given in December, 1975, in this district in United States v. Tutino, 75 Cr.1038. In that case it was revealed that Mrs. Ladd had spent over seventeen years in jail, as a consequence of approximately fifty-five arrests principally resulting from her activities as a "con artist". Her modus operandi was to approach gullible persons, particularly elderly people and sever them from their life savings through

*In September, 1974, a search pursuant to a warrant was conducted at Mr. Moten's home in Englewood, New Jersey. During the course of that search, police officers allegedly found 1/2 cigarette's worth of marajuana, although the extensive handwritten item by item inventories of property seized nowhere indicated such contraband.

some fraudulent scheme. Also developed at that trial, though only parenthetically, was her relationship to Frank Moten. In 1974 after an unsuccessful attempt to borrow money from him, Marian Ladd wrote an extortionate letter to Frank Moten which he promptly reported to the local district attorney's office. As a result Mrs. Ladd was arrested. Her son Bruce, who was with her at the time of her arrest, was searched and criminally charged for possession of heroin found on his person. Mrs. Ladd's efforts to destroy Frank Moten stem from that date.

And those efforts have been reinforced. After functioning as a paid government informant for many months Mrs. Ladd's subsidy was terminated. She was restored to her regular payments through the efforts of the Assistant United States Attorney in the District of New Jersey in return for her testimony against Frank Moten which resulted in his indictment there.

It should come as no surprise that the jury in this district rejected Mrs. Ladd's testimony in the Tutino case. Thus, since her testimony has been weighed and found wanting before, it is reasonable to believe that when weighed by the jury here it will be found wanting again.

The other bulwark of the government's case is Jack Brown. I have personally interviewed five people, not in[illegible]ing Frank Moten, who have known Brown for many years. Each of them voiced the opinion that he was psychologically deranged,

some suggesting the form of his illness to be paranoia. Though I do not suggest that their opinions approach the quality of a psychiatric diagnosis, neither do they seem too far a field.* From all accounts Mr. Brown was addicted to the use of cocaine and when under its influence perceived non-existent threats to which he reacted violently. On several occasions he has shot at inanimate objects. On others he has shot at quite animate beings including once his infant son. These are not mere rumors. Brown has been arrested for shootings. Indeed he is eloquent testimony to his own insanity. He has shot the toe off of his own left foot during one of his frenzies. Far from hyperbolizing, the defendant has understated how fetid the government's case is. While he acknowledges the government's right to try him, it is out of all proportion and perspective to require $600,000.00 bail on the basis of such witnesses.

*In one of his many conflicts with the law, Brown was sentenced to probation by a New Jersey court on the condition that he receive psychiatric treatment.

DEFENDANT'S FAMILY TIES AND LENGTH OF RESIDENCE IN THE COMMUNITY

On this aspect of the analysis, the government has not a scintilla of merit on its side. The defendant has resided in the greater New York area for thirty years. He is fifty-four years old, married and has three children. He owns a home and laundromat business in the community. But far more eloquent than these facts are the letters offered in support of his application to reduce his bail made before Judge Owen from friends and business associates who know his devotion to his family and his dedication to the Harlem community. Far from being a destroyer of his people, as these charges so falsely suggest, Frank Moten's track record in his community speaks for itself. I respectfully refer the Court to the opinion of those individuals who know best and who have come forward to support him despite the nature of these charges (a 95).

RECORD OF CONVICTION AND COURT APPEARANCES

Frank Moten has no criminal record save a 1943 O.P.A. conviction which Mr. Beller has characterized as trivial. He is presently at liberty on $75,000.00 bail which has been sufficient to secure his attendance in the federal district court in Atlanta, Georgia and Newark, New Jersey whenever his presence was required.

While these things are strong circumstantial indication of his lack of intent to flee, there is the virtually conclusive direct proof that Frank Moten surrendered himself after being informed of the charges. How then can it be seriously argued that he intends to flee? Where is the shred of proof to support that speculation? All the government has shown is that one time, before all his assets were attached with revenue liens in 1974, he and his family lived comfortably on his earnings from the jewelry business in a brick house on a 1/2 acre of land in Englewood, New Jersey.* Both in the application to reduce bail before Judge McMahon and before Judge Owen the government made various allegations concerning the finding of stolen property in Mr. Moten's home, the seizure of gambling records, and the seizure of cash. All of these allegations, which have varied

*That home which is presently subject to a revenue lien, was purchased by Mr. and Mrs Moten in 1963 for a total purchase price of $50,500.00, with a down payment of $15,000.00 and mortgage payments of $240.00 per month.

from hearing to hearing, have been inaccurate.

A warrant issued for Mr. Moten's home in September, 1974, seeking the seizure of narcotics and gambling paraphernalia. During the execution of that warrant a hand gun was found which was alleged to have been stolen on the basis of a N.C.I.C. report. Ultimately it was determined that that gun was not stolen and the criminal complaint lodged against Mr. Moten on September 24, 1974 was withdrawn. Mr. Beller has alleged that an additional $136,000.00 worth of stolen property was recovered from Mr. Moten's home. Taking the New Jersey criminal complaints at face value less than $10,000.00 worth of stolen property was allegedly seized. Interestingly, although very detailed hand written inventories of the jewelry seized in his home have been prepared by the seizing officers, the stolen bracelet he has been criminally charged with possessing is nowhere to be found on any of the inventories.* People v. Moten, Bergen County Court.

The government has also made mention of the seizure of sixty-nine days worth of lottery receipts from which it extrapolates a phenomenal income from gambling activities. Although the warrant issued specifically for the seizure of gambling paraphernalia, and other items seized from his home were meticulously inventoried, no inventory exists reflecting the seizure of these receipts. Finally, Mr. Beller's assertion that $12,000.

*The existence of the alleged stolen bracelet first came to light during the testimony of Special Agent Gaffney of F.B.I. in connection with a motion to suppress in the Bergen County Court. (a 91).

was seized from Mr. Moten's home is totally incorrect. There was less than $2,000. cash found in his home.

Suffice it to say that the government has not and cannot show that Mr. Moten presently possesses either the assets or the intent to flee. Indeed the evidence is against the government on both scores.

THE DEFENDANT'S CHARACTER

The structure of §3146(a) indicates its preference for release secured by conditions less onerous than bail bonds. The first such alternative is:

> "place the person in the custody of a designated person or organization agreeing to supervise him".

In support of his application to reduce bail, many of Mr. Moten's friends and business associates wrote to the district court (a 95). Their testimonial to his character needs no reiteration. What does bear repeating is that outstanding members of the community have offered to do exactly what the Bail Reform Act endorses; put themselves on the line as sureties for him because of their total assurance that he would never abuse their trust in him. If church and community leaders fully acquainted with both the charges and the man, are more than "reasonably assured" that he will face these charges can the district court reasonably have concluded that they were all mistaken?

These people know, because they know the man, that Frank Moten wouldn't flee if released on his own recognizance. However, they stand ready to act as personal sureties. Should this Court see fit to reduce his bail, approximately $100,000.00 in bail bonds in addition to the $75,000.00 already posted could

be secured with collateral provided by his friends. This figure is submitted in an effort to indicate to this Court an accurate assessment of the defendant's ability to post bail. The defendant cannot make the bail presently set and should not be held for want of bail under the circumstances of this case.

POINT I

THE REFUSAL TO REDUCE THE APPELLANT'S BAIL WAS AN ABUSE OF DISCRETION

At the outset, and before turning to the specific issues raised by this appeal it is necessary to examine the impact of the presumption of innocence on pretrial matters, generally, and on bail, specifically. The presumption of innocence has been viewed by some courts as being solely an evidentiary presumption, which at trial creates the necessity of proving the accused guilty beyond a reasonable doubt. However, the increasing body of case law indicates that the presumption of innocence is more than just a trial presumption. This presumption, if that is really the most accurate word to describe it, indicates the proper perspective from which to view those merely accused of crimes.* It is a fundamental concept which gives direction to our system of criminal justice. It also has more specific effects. For example, it has frequently been held that the presumption of innocence mandates different treatment for pretrial detainees from that afforded to persons convicted of crimes:

> Petitioner is a pretrial detainee and not a convict. Under the Constitution, he is

*An indictment, having no evidentiary weight, does not affect the presumption. United States v. Poretto, 196 F.2d 392, 395 (5th Cir. 1952); United States v. Foster, 9 F.R.D. 367 (S.D.N.Y., 1949).

> presumed be innocent of the pending and untried criminal charges against him. He cannot be subject to any punishment, let alone cruel and unusual punishment.

Conklin v. Hancock, 334 F.Supp. 1119 at 1121 (D.C. of N.H., 1971). Tyler v. Ciccione, 299 F.Supp. 684, 687 (W.D.Mo., 1969); Jones v. Wittenberg, 323 F.Supp. 93, 99-100 (D.C.N.D., Ohio, 1971); aff'd 456 F.2d 854 (6th Cir.); Hamilton v. Love, 328 F.Supp. 1182, 1191 (D.C.E.D., Ark., 1971); Smith v. Sampson, 349 F.Supp. 268, 271 (D.C. of N.H. 1972). See also United States v. Koon Wah Lee, 6 F.R.D. 456 (D.C. Hawaii, 1947).

Most significantly, the Supreme Court has indicated that there is a crucial interplay between the presumption of innocence and the traditional right to be free pending trial. Stack v. Boyle, 342 U.S. 1, 5 (1951). The Court of Appeals for the Second Circuit has stated this even more clearly:

> "The purpose of bail before trial is to insure the presence of the accused when required without the hardship of incarceration before guilt has been proved and while the presumption of innocence is to be given effect. United States v. Mulcahy, 155 F.2d 1002, 1004 (2d Cir., 1946). (emphasis supplied)

Also, Glynn v. Donnelly, 470 F.2d 95, 98 (1st Cir., 1972); United States ex rel. Priest v. Dept. of Correction ex rel. Nardini, 267 F.Supp. 24w (D.C. Del., 1967) aff'd 390 F.2d 150.

The New York Court of Appeals has also indicated that the presumption of innocence must be given effect in resolving issues pertaining to bail. People ex rel. Lo[illegible]ll

v. McDonnell, 296 N.Y. 109 (1947).

> The policy of our law favors bail because of the presumption that the prisoner is innocent. Id at 111

Thus, the growing body of case law indicates an awareness of the impact of the presumption of innocence on pretrial matters. The appellant does not rely on the presumption as the entire basis of his argument. However, at the very least, it sets the context in which to view the treatment of those merely accused of criminal behavior.

The Right to Bail

It has been held that the Federal* Constitution does not require that bail must be set in all instances. The initial decision whether or not bail should be set is in the discretion of the Court.** Ward v. United States, 76 S.Ct. 1063 (1956); Carlson v. Landon, 342 U.S. 524, 545 (1952); People ex rel. Shapiro v. Keeper of City Prison, 290 N.Y. 393, 398 (1943); People ex rel. Klein v. Kruger, 25 N.Y.2d 497, 499 (1969); People ex rel. Goins v. Howard, 41 A.D.2d 683 (3d Dept. 1973); People v. Pobliner, 66 Misc2d 209 (Sup.Ct.,Spec.Term, Nassau Co.,1971); People ex rel. La Force v. Skinner, 65 Misc. 2d 884 (Sup.St., Monroe Co., 1971); People v. Melville, 62 Misc. 2d

*U.S. Const., Amdt. 8.

**It is true, that there is a distinction between the Federal and New York law on bail. Federal law makes bail mandatory in all non-criminal cases. 18 U.S.C. §3146 (eff.1966). In New York, such bail is discretionary. However, for purposes of the issues discussed here, the Federal cases decided prior to 1966 are in accord with the New York cases.

366, 371-72 (Crim.Ct., N.Y.Co., 1970).*

While bail is not constitutionally required in all non-capital cases, the guarantee against excessive bail:

> ...certainly requires that legislative provisions must, to satisfy constitutional limitations, be related to the proper purposes for the detention of defendants before conviction, as must the judicial applications of discretion authorized by the Legislature.

People ex rel. Klein v. Krueger, supra, at 500-501.

The Supreme Court of the United States has stated:

> This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See Hudson v. Parker, 1895, 156 U.S. 277, 285, 15 S. Ct. 450, 453, 39 L.Ed. 424. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.
>
> The right to release before trial is conditional upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Ex parte Milburn, 1835, 9 Pet. 704, 710, 9 L.Ed. 280 . . . .Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment. See United States v. Motlow, 10 F.2d 657 (1926, opinion by Mr. Justice Butler as Circuit Justice of the Seventh Circuit).
>
> Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. Stack v. Boyle, 342 U.S. 1, 4-5 (1951).

*Once bail is set, however, there is an absolute right that the amount of bail not be excessive. Carlson v. Landon, 342 U.S. 524, 545 (1952); People ex rel. Shapiro v. Keeper of City Prisons, 290 N.Y. 393, 398 (1943).

Justice Jackson's specially concurring opinion further stated (342 U.S. at 8):

> Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice...

The importance of release on bail is not merely restricted to the avoidance of the "infliction of punishment prior to conviction". The adverse impact of detention ranges from interference with defense preparation for trial, which may increase the likelihood of conviction, to the inducement of coercion of guilty pleas. Studies have shown that defendants released on bail suffer a much lower rate of conviction than those detained. See, Ares, Rankin & Sturz; "The Manhattan Bail Project; an Interim Report on the Use of Pretrial Parole." 38 N.Y.U.L.R. 67, 84 (1963). Nor can this be explained away by the fact that many of the factors which lead to release on bail also favor the defendant's innocence (e.g. the strength of the prosecution's case). Studies in which this variable is controlled, still contain a significant difference in conviction rates. See, Rankin, "The Effect of Pretrial Detention," 39 N.Y.U.L.Rev. 641 (1964).

Thus, while bail is not mandatory, it is a most significant right, which should be abrogated only when the purposes of bail cannot be satisfied by other means.

Under all of the circumstances of this case, the undisputed fact that the defendant surrendered with knowledge of the charges pending against him, his roots in the community and his lack of any serious criminal convictions, all warrant the conclusion under the totality of circumstances that it was an abuse of the trial court's discretion to deny the application to reduce the appellant's bail.

CONCLUSION

FOR ALL OF THESE REASONS THIS COURT SHOULD REDUCE THE APPELLANT'S BAIL.

8/2/76

Respectfully submitted,

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